UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE JAMES A. GIVENS, debtor.	BK No. 96-13585
APPEAL OF JAMES A. GIVENS FROM AN ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF RHODE ISLAND	C.A. No. 98-18T

DECISION

James A. Givens ("Givens") has appealed, pursuant to 28 U.S.C. § 158(a)(1), from a series of orders entered by the Bankruptcy Court. Givens challenges the Bankruptcy Court's findings that he violated a non-competition agreement between him and Givens Marine Survival Company ("GMS"), and that he was in contempt of an order enjoining him from competing against and slandering GMS.

The issues presented are (1) whether the Bankruptcy Court erred in finding that the scope and duration of the non-competition agreement were reasonable and did not render the agreement unenforceable, and (2) whether the Bankruptcy Court erred in finding Givens in contempt for continuing to service and certify others to service the life rafts, after having been enjoined from competing with GMS.

Because I find that the Bankruptcy Court did not err in finding the non-competition agreement to be reasonable, the injunction prohibiting Givens from competing with GMS is

AFFIRMED. However, because I also find that neither Givens' servicing of life rafts nor his certification of others to service the rafts constitutes competition with GMS, the order finding Givens in contempt is VACATED.

Background

Givens invented an inflatable buoy-stabilized life raft known as the Givens Buoy Life Raft. For more than two decades, Givens made his living manufacturing, selling, servicing, and certifying others to service these rafts. Givens carried on his business under a variety of names, including Givens Ocean Survival Systems ("GOSS"), which was located at 35 Lagoon Road, Portsmouth, Rhode Island. Givens was GOSS's sole shareholder and officer.

In 1978, Givens granted to RPR Manufacturing, Co., the exclusive right to manufacture a version of the raft known as RPR's Givens Buoy Life Raft. RPR, in turn, authorized Givens to continue servicing and certifying others to service the rafts that it manufactured. Givens, through GOSS, serviced the rafts at GOSS's Portsmouth location and certified others around the country to service them.

In 1995, GOSS experienced severe financial problems. Accordingly, Givens entered into an agreement with Frank Perrino, under which Perrino was to provide much needed capital in exchange for certain rights in Givens' business. Pursuant to

that agreement, Givens and Perrino formed a new corporation, Givens Marine Survival Co. ("GMS"). The agreement is evidenced by two documents: a November 14, 1995 letter agreement and a November 29, 1995 bill of sale and assignment agreement. Both documents were drafted by Perrino.

The letter agreement contains three paragraphs that are relevant to this dispute:

> 2. I [Givens] will transfer all my rights and ownership interests in and to the Givens Buoy Survival Raft and in and to Givens Ocean Survival Systems, Inc. or its assets to [GMS] in exchange for share of common stock of [GMS] . . .
>
> 4. You [Perrino] are hereby granted equal rights to promote, market, offer, and sell the Givens Buoy Survival Raft for the life of this agreement. I will not take any action or enter into any relationship which competes with, or may compete with you or the Givens Buoy Survival Raft by whatever trade name it may be known.
>
> 6. The entity which will perform ongoing repair on and other services for the Givens Buoy Survival Raft will not be [GMS], but will be owned initially by Mr. Givens and Mr. Perrino.

The November 29 bill of sale contains the following relevant language:

> . . . James A. Givens . . . hereby sells, assigns, and conveys to Givens Marine Survival Co., Inc., . . . all of his right, title, and interest in and to the concept and design of the Givens Buoy Life Raft, . . . and all his rights to manufacture and sell, and the right to license the manufacture and sale of, the Givens Buoy Life Rafts, by whatever name known.
>
> James A. Givens hereby also sells, assigns, and conveys to Givens Marine Survival Co., Inc., all manufacturing equipment now owned by him used or useful in the

> manufacturing of Givens Buoy Life Rafts and related articles.
>
> For the consideration aforesaid, James A. Givens hereby covenants that he will not engage in the design, manufacture, and sale of life rafts except for GMS (Givens Marine Survival Co., Inc.).

Both the November 14 letter agreement and the November 29 bill of sale contain promises by Givens not to compete with GMS in the design, manufacture, and sale of the life raft. There are no geographic or temporal restrictions on the non-competition agreement.

Pursuant to paragraph 2 of the letter agreement, Givens transferred all of GOSS's assets to GMS. However, the entity to service the rafts contemplated by paragraph 6 of the letter agreement never was created.

In consideration of the assignment of his rights in the raft, GMS issued 350,000 shares of stock to Givens. Givens and Perrino became president and vice president, respectively, of GMS.

GMS alleges that, in April 1996, Givens, through GOSS, began selling rafts, diverted GMS's telephone number to GOSS's location at 35 Lagoon Road, and importuned GMS customers to purchase rafts from Givens instead of GMS. Givens later left GMS and continued selling rafts on his own.

Procedural History

GMS sued Givens in state court to prevent Givens from

competing against and slandering GMS. Givens filed a bankruptcy petition and, in November, 1996, GMS removed the case to the Bankruptcy Court.

On March 17, 1997, after a five-day hearing on GMS's motion for preliminary injunction, the Bankruptcy Court issued a preliminary injunction enjoining Givens from (1) making and/or selling the raft, and (2) making any representation that GMS has no authority to sell the raft.

Givens' ex-wife, later, formed a new corporation that continued to manufacture, sell, and service the raft. That corporation used the Givens name and GOSS's former logo, motto, and telephone number. As a result, on June 30, 1997, GMS filed a motion to adjudge Givens in contempt, claiming that the corporation simply was a subterfuge used by Givens to violate the preliminary injunction.

Prior to hearing the motion for contempt, the Bankruptcy Court held a four day trial on GMS's request for a permanent injunction. At trial, GMS disclaimed any desire to stop Givens from servicing the rafts and sought only to prevent Givens from designing, manufacturing, and selling them.

On July 29, 1997, the Bankruptcy Court issued a permanent injunction, prohibiting Givens from (1) designing, marketing, or selling the raft for a period of six years, and from entering into any relationship that competes against GMS, (2) using the

trademarked “Givens Buoy Life Raft” name (or any derivation thereof), and (3) slandering GMS or Perrino or making any representations that GMS has no authority to sell or service the rafts.

Two weeks later, Givens wrote to various distributors claiming that he was the only one authorized to service the rafts manufactured by RPR, and that rafts serviced by GMS cause fatal injuries.

Shortly thereafter, the Bankruptcy Court conducted a hearing on GMS’s contempt motion. It rejected the claim that Givens was competing with GMS through the corporation established by Givens’ ex-wife but found Givens in “technical” contempt of the preliminary injunction on the ground that Givens’ actions in servicing the rafts and certifying others to service them competed with GMS’s business. However, because the Bankruptcy Court determined that Givens was not fully aware of these restrictions, it did not impose sanctions.

Givens appealed both the permanent injunction and the contempt order to this Court. This Court remanded the case to the Bankruptcy Court for additional findings of fact and conclusions of law. On June 28, 2000, the Bankruptcy Court responded by finding that, contrary to its earlier ruling, Givens did not transfer his right to service the rafts to GMS, but that such right was limited to Givens’ Portsmouth, Rhode Island

location. The Bankruptcy Court also reaffirmed its earlier ruling that Givens did transfer to GMS his right to certify others to service the rafts. The Bankruptcy Court also made supplementary findings in support of its determination that Givens should be prohibited from competing with GMS, worldwide, for a period of six years.

Summary of Claims

In this appeal, Givens argues that:

1. The Bankruptcy Court erred in determining that the non-competition agreement is enforceable because:

(a) Givens was not represented by counsel when the November 1995 letter agreement was signed;

(b) the Bankruptcy Court relied on perjured testimony by Perrino; and

(c) the non-competition agreement does not protect any legitimate interest of GMS.

2. The geographical scope and the duration of the non-competition restrictions established by the Bankruptcy Court are unreasonable.

3. The Bankruptcy Court erred in finding that Givens' authority to service the rafts was limited to his Portsmouth, Rhode Island location.

4. The Bankruptcy Court erred in finding that Givens' right to certify others to service the rafts was one of the

assets transferred by GOSS to GMS. More specifically, Givens asserts that only RPR has the right to determine who can service its rafts, and, in any event, the agreement between GOSS and GMS expressly states that GMS did not acquire any right to service the rafts, and that servicing and certification are inextricably linked such that one cannot control servicing without also being able to certify others to service the rafts.

Standard of Review

In reviewing an order of the Bankruptcy Court, the District Court must accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. Fed. R. Bankr. P. 8013; Federal Nat'l Mortgage Assoc. v. Ferreira, 223 B.R. 258, 260 (D.R.I. 1998). A finding is clearly erroneous only if the reviewing court has a "definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Peerless Ins. Co. v. Rivera, 208 B.R. 313, 315 (D.R.I. 1997). The Bankruptcy Court's conclusions of law, however, are subject to de novo review. Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997).

Analysis

1. Enforceability of the Non-Competition Agreement

Givens' argument that the agreement is unenforceable because he was not represented by counsel when he signed the letter agreement lacks merit. The absence of counsel may be a factor

to be considered in determining whether a party should be permitted to avoid an agreement on grounds such as fraud or mistake. However, an agreement is not per se unenforceable simply because one of the parties was not represented by counsel.

Givens also asserts that the letter agreement is not enforceable because he was under duress when he signed it, but Givens has presented nothing that supports his assertion.

Givens' next argument, that the Bankruptcy Court erred in relying on perjured testimony by Perrino, also fails. Once again, Givens presents nothing other than his own bald assertions to support this argument. Assessing the credibility of witnesses is part of the fact-finding process and the Bankruptcy Court's determinations regarding credibility are entitled to considerable deference. See Fed. R. Bankr. P. 8013. This Court sees no basis for disturbing the Bankruptcy Court's implicit finding regarding Perrino's credibility.

Finally, this Court rejects Givens' argument that the non-competition agreement is unenforceable because it does not protect any legitimate interest of GMS.

A non-competition agreement is valid if the party seeking to enforce the agreement shows that "(1) the provision is ancillary to an otherwise valid transaction or relationship, such as . . . a contract for the purchase and sale of a business, (2) the provision is supported by adequate consideration, and (3) there

exists a legitimate interest that the provision is designed to protect." Durapin, Inc. v. American Prods., Inc., 559 A.2d 1051, 1053 (R.I. 1989) (citations omitted).

It is undisputed that Givens' agreement not to compete was ancillary to GMS's purchase of GOSS's assets, in consideration for which Givens received 350,000 shares of GMS stock. However, Givens claims that the non-competition agreement is not designed to protect any legitimate interest of GMS. That claim, too, is without merit.

It is well established that the buyer of a business has a legitimate interest in preventing the seller from diminishing the value of what was purchased by competing with the buyer. See, e.g., Restatement (Second) of Contracts § 188(2)(a) (valid covenants not to compete include "a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold"). It is true that, under Rhode Island law, the desire to be free from competition cannot be the sole justification for a non-competition agreement. Durapin, 559 A.2d at 1057. However, in this case, the Bankruptcy Court made express findings that the non-competition agreement also was designed to protect the name, goodwill, and proprietary information regarding the design, manufacture, and market of the raft that were among the assets purchased from GOSS by GMS. See Nestle Food Co. v. Miller, 836 F. Supp. 69, 75 (D.R.I.) (1993)

(finding "no doubt that . . . 'goodwill' with the Rhode Island customers, built up by Miller over the years on behalf of Nestle, is a legitimate interest"). The Bankruptcy Court's findings are unassailable.

2. Reasonableness of the Restrictions Established by the Bankruptcy Court

Under Rhode Island law, when a covenant not to compete does not include temporal or geographic limitations, the Court may read into the agreement such restrictions as may be reasonable under the circumstances. Durapin, 559 A.2d at 1058. In determining what is reasonable, the Court must consider that even if the interest protected by the agreement is legitimate, the agreement not to compete may still be invalid if the restraint on trade, as reflected in the geographical and temporal scope, is greater than is needed or the interest is outweighed by the hardship caused the other party and likely injury to the public. See Nestle Food Co., 836 F. Supp. at 74; Restatement (Second) of Contracts, § 188(1) & cmt. d.

Unfortunately, neither GMS nor Givens has presented much in the way of evidence or legal analysis to assist either the Bankruptcy Court or this Court in making that determination. In general, a decision as to whether the duration and scope of a non-competition agreement are reasonable depends on the facts of the particular case. The Bankruptcy Court's findings of fact are

entitled to considerable deference. They are reviewed under a clearly erroneous standard and should be rejected only if the district court has a "definite and firm conviction that a mistake has been made." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

a. The Six Year Restriction

There is ample evidence to support the Bankruptcy Court's finding that prohibiting competition for a period of six years was necessary to protect GMS's legitimate interests. Included among those findings are the following: GMS is a start-up company with limited resources; GMS's prospects for succeeding rest on the continued goodwill of GOSS's business and reputation of the Givens name; and GMS is not likely to survive if Givens is allowed to compete with GMS. Givens himself admitted that it would be several years before GMS could increase its sales beyond the paltry 14 rafts per year that it was selling at the time of the permanent injunction hearing.

Nor is there any basis for disturbing the Bankruptcy Court's determination that the need for a six-year restriction outweighed the hardship imposed on Givens. Givens remains free to engage in other facets of the marine safety and/or boating business. In addition, as discussed infra, he can continue to service the Givens life raft. While this Court, in Nestle Food Co., held that a one-year local restriction was unenforceable as written,

reliance on that holding is misplaced because, there, the Court found that the employer had failed to show why a one-year non-compete was necessary to protect its goodwill in the geographic area. See Nestle Food Co., 836. F. Supp. at 75-76. GMS has adequately made such a showing here.

b. The Geographical Restriction

Similarly, the Bankruptcy Court's finding that a worldwide restriction is necessary to protect GMS's legitimate interests is not clearly erroneous. Both Givens and Perrino testified at the permanent injunction hearing that the market for the Givens life raft is worldwide. See Oakdale Mfg. Co. v. Garst, 28 A. 973, 975 (R.I. 1894) (finding non-competition agreement in which one party agreed not to compete in the margarine market for five years, worldwide, was reasonable because "parties contemplated an extensive business, with a special effort to develop an export trade"); Superior Consulting Co. v. Walling, 851 F. Supp. 839, 847 (E.D. Mich. 1994) (applying same standard as Rhode Island and finding that worldwide non-competition agreement reasonable when employer has legitimate business interests throughout world).

3. The Right to Service the Rafts

Givens argues that the Bankruptcy Court erred in limiting Givens' right to service Givens rafts to his Portsmouth, Rhode Island, location. In reviewing the Bankruptcy Court's decision, this Court looks first to the letter agreement and the bill of

sale which are less than models of clarity and good draftsmanship.

Paragraph Four of the letter agreement mentions Perrino's rights in promoting, marketing, offering, and selling the life raft but makes no mention of servicing. Indeed, at the preliminary injunction hearing, Perrino acknowledged that, at least insofar as Givens' Portsmouth location was concerned, Givens was not prohibited from servicing the rafts. Moreover, paragraph Six of the letter agreement expressly states that the rafts would be serviced by another entity and not by GMS.

Similarly, the bill of sale provides only that Givens will not "engage in the design, manufacture and sale of life rafts except for GMS." (Emphasis added.) Once again, servicing is conspicuous by its absence.

Nor does it appear that servicing the rafts can fairly be described as a form of competition with the business of manufacturing and selling them.

In short, there is no evidence supporting the Bankruptcy Court's conclusion that Givens is prohibited from servicing these rafts at locations other than Portsmouth.

4. Certification of Others to Service the Rafts

Like the right to service Givens' rafts, the right to certify other parties to service them is not mentioned in the letter agreement or bill of sale describing what Givens

transferred to GMS. Nor has GMS pointed to any other evidence supporting the Bankruptcy Court's conclusion that Givens is precluded from issuing such certifications.

It is not even clear that Givens has any right to certify that could have been transferred. Presumably, the right to certify those authorized to service the rafts would reside with RPR as the raft's manufacturer. There is nothing in the record indicating how Givens acquired the purported right to issue such certifications, let alone any authority to assign that right to GMS.[1]

By the same token, in the absence of any evidence that Givens had the exclusive right to certify, or even service, RPR rafts, or that GMS had no right to service them, it is not permissible for Givens to make such representations to potential customers.

5. Additional Arguments by Givens

In his post-argument memorandum, Givens makes a number of additional arguments that are inadequately developed or supported. In any event, these arguments were not raised in either the Bankruptcy Court or Givens' initial memorandum in this Court. Therefore, they are deemed to have been waived.

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[1] Givens claims that Coast Guard regulations provide that only the manufacturer may determine who is authorized to service its rafts. However, the regulations do not support that claim. See 46 C.F.R. § 160.151-1, et seq. The regulations apply only to Coast Guard approved life rafts while the rafts at issue in this case are the RPR rafts sold by GOSS which are not Coast Guard approved and the rafts which GMS is manufacturing itself.

Conclusion

For the foregoing reasons, the Bankruptcy Court's order enjoining Givens from, inter alia, competing with GMS using the trademark "Givens Buoy Life Raft" and/or representing to others that GMS has no authority to sell or service rafts manufactured by RPR is AFFIRMED, and the order finding Givens in contempt on the ground that Givens' actions in servicing rafts and certifying others to service them violated Givens' covenant not to compete with GMS is hereby VACATED. The Court does not reach the question of whether, under Coast Guard regulations,[2] it is permissible for Givens to service rafts manufactured by GOSS.

IT IS SO ORDERED:

_____
Ernest C. Torres
Chief United States District Judge
Date:_____

[2]See n. 1, supra.